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No. 88-1564

In the Supreme Court of the United States

OCTOBER TERM, 1988

KEVIN P. JUDGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether evidence discovered inside a sealed bag during an inventory search of petitioner's car should have been suppressed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 864 F.2d 1144. An earlier opinion of the court of appeals (Pet. App. 14a-20a) is reported at 846 F.2d 274. The order of the district court (Pet. App. 9a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1989. A petition for rehearing was denied on February 21, 1989 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on March 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846; distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); and interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952. Petitioner was sentenced to 20 years' imprisonment and to a five-year special parole term. He was also fined $10,000.

1. At trial, the government established that on June 16, 1986, Joe Frazer traveled from New York to Fort Worth, Texas, where he sold one ounce of cocaine to two undercover agents of the Drug Enforcement Administration. Frazer identified petitioner as his "boss" in New York. Pet. App. 15a.

The same two DEA agents subsequently negotiated with Frazer and petitioner for the purchase of three kilograms of cocaine. On June 25, 1986, pursuant to their agreement, Frazer delivered that amount of cocaine to one of the agents while the other agent remained with petitioner in a nearby restaurant. Following Frazer's arrest, several DEA agents approached and arrested petitioner at the restaurant. The agents seized the automobile that petitioner had driven to the restaurant and conducted an inventory search of its contents. They discovered a sealed bag inside the trunk. They opened the bag and found $65,000 in cash inside. Pet. App. 15a-16a.

2. The district court denied petitioner's motion to suppress the $65,000. The court concluded that the seizure of that evidence was the result of a valid inventory search. On petitioner's appeal from his convictions, the court of appeals remanded for the limited purpose of allowing the district court to determine whether the applicable DEA regulations mandated the agents' inventory of the contents of petitioner's sealed bag. Pet. App. 14a-20a.

On remand, the district court again upheld the inventory search (Pet. App. 9a-13a). The court found that once a container is taken into custody, standard DEA procedures "clearly 'mandate the opening of closed containers to inventory their contents' " (*id.* at 11a). The court further found that nothing in the record suggested that the agents had acted in bad faith (*id.* at 12a). The court rejected petitioner's contention that the search was unlawful because one of the agents had admitted "that if, during the course of inventorying items seized, an agent discovered a shaving kit, he was vested with discretion to inventory its contents" (*id.* at 11a). According to the court, "[t]he fact that, perhaps, in some other hypothetical search, the agents could make the administrative, not *evidentiary*, decision to list a container as a single item or list its contents separately has no bearing here, where the agents strictly complied with the [DEA] Manual's requirement that contents of all items seized 'be thoroughly searched to inventory its contents' " (*id.* at 12a-13a (quoting DEA Agents' Manual § 6654.24(D)).

3. The court of appeals affirmed (Pet. App. 1a-8a). The court recognized that the DEA regulations provided the agents with discretion in determining (1) whether an item constituted a "container" and therefore had to be opened and its contents inventoried; and (2) whether to take property into custody rather than leave it unattended or return it to a person designated by the arrestee. The court found, however, that the agents' exercise of discretion in making these two determinations did not invalidate the inventory search in this case. *Id.* at 4a-8a.

According to the court, "the agent's decision that the bag was a container was within the bounds of administrative discretion" because "bags of that sort are often used to carry valuable personal items or, as was the case here, sums of money. It was also large enough to contain a

bomb or gun." Pet. App. 5a-6a, 7a-8a. The court likewise concluded that the agents' decision to take the contents of the car into custodial safekeeping did not constitute "an impermissible use of discretion" (*id.* at 7a). "[Petitioner] was alone when arrested, and there was no showing that it would have been possible to turn the property over to another" (*ibid.*).

Finally, the court rejected petitioner's claim that the "DEA regulations, which state that all items not having evidentiary value will be returned to their owner (or presumably maintained in custodial safekeeping if the owner is under arrest), vest DEA agents with impermissible discretion under [*Colorado* v. *Bertine*, 479 U.S. 367 (1987)] since they must decide if an item has evidentiary value" (Pet. App. 3a n.1 (emphasis omitted)). "This argument fails," the court explained, "because *Bertine* applies to decisions of whether to open containers during an inventory search" (*ibid.*). While removing nonforfeitable personal property from a conveyance seized as forfeitable, "it is not an impermissible use of discretion to retain property (which, by the fact that it is being removed from the vehicle, is in the agents' plain view) that may have evidentiary value" (*ibid.*).

ARGUMENT

Contrary to petitioner's claim (Pet. 5-8), the court of appeals' decision that the agents conducted a valid inventory search of petitioner's bag is consistent with this Court's decision in *Colorado* v. *Bertine*, 479 U.S. 367 (1987). Hence, further review is not warranted.

In *Colorado* v. *Bertine*, this Court held that an officer may open a container within a car during an inventory search as long as the officer is following standard police procedures (see 479 U.S. at 372-375; *id.* at 376-377

(Blackmun, J., concurring)). As both courts below found, the inventory search in this case fully conformed with standard DEA procedures. Section 6663.63(C) of the DEA Agents' Manual, which concerns "Articles Taken into Custody for Safekeeping," provides that "[t]o protect DEA against any subsequent claims regarding lost or missing property, all property taken into custody for safekeeping will be thoroughly inventoried, including opening locked containers to inventory their contents" (Pet. App. 29a-30a). Similarly, Section 6654.24(D), which deals with the seizure of conveyances used in connection with the sale of a controlled substance, provides that "[u]pon seizing the conveyance, it must be thoroughly searched to inventory its contents" (Pet. App. 25a).

There is no merit to petitioner's contention (Pet. 5) that these DEA regulations vest the agents with impermissible discretion because they require an agent to determine whether an item found during an inventory search is a "container," the contents of which must therefore be inventoried. As the court of appeals explained (Pet. App. 4a), determining what constitutes a container is inherently discretionary: "the exercise of some discretion by agents, even if only interpretive, is inevitable since no manual can reasonably be expected to spell out in detail the correct action in light of the almost infinite array of objects an agent may encounter."

This Court has made clear, moreover, that "[n]othing * * * prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity" (*Colorado* v. *Bertine*, 479 U.S. at 375). As the court of appeals found, the agents exercised their discretion in this case on the basis of "something other than suspicion of evidence of criminal activity." The "container" they seized from petitioner's car

was of the kind "often used to carry valuable personal items" and "was also large enough to contain a bomb or gun" (Pet. App. 7a-8a). Hence, the agents' decision to inventory its contents fully comported with "standard criteria" and did not reflect an impermissible exercise of discretion for investigatory purposes.

Nor is there any merit to petitioner's assertion (Pet. 5-6) that the DEA Manual vests the agents with impermissible discretion because Section 6654.24(D) provides that "[a]ll articles not part of the conveyance and not having evidentiary value, or not subject to separate forfeiture action, will be removed and returned to the owner without delay" (Pet. App. 25a). As the court of appeals explained (*id.* at 3a & n.1), the agents' decision to inventory personal items seized from an automobile is not rendered invalid because the agents are directed to remove from the car any items having evidentiary value. Items having evidentiary value that are seen in plain view by officers who have a right to be where they are when they see the items may lawfully be seized. The fact that the DEA regulations expressly recognize this basic principle of Fourth Amendment law does not render DEA inventory searches unlawful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
DEBORAH WATSON
Attorney

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